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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)
)
 Plaintiff-Respondent,) NO. 39449
)
 vs.)
)
 RICHARD ANDREW HUBBARD,)
)
 Defendant-Appellant.)
)
 _____)

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

HONORABLE CHERI C. COPSEY
District Judge

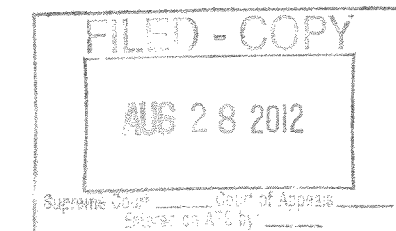
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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
Nature of the Case.....	1
Statement of Facts and Course of Proceedings	1
ISSUES	2
ARGUMENT	3
I. Hubbard Failed To Preserve His Claim That The District Court's Sentence Is Illegal.....	3
A. Introduction.....	3
B. Hubbard Failed To Preserve His Illegal Sentence Claim	3
C. Even If This Court Analyzes Hubbard's Claim For Fundamental Error, Hubbard Has Failed To Establish Such Error.....	6
II. Hubbard Has Failed To Show The District Court Abused Its Sentencing Discretion	10
A. Introduction.....	10
B. Standard Of Review	10
C. The District Court Acted Within Its Sentencing Discretion.	11

III.	Hubbard Has Failed To Preserve His Claim That The District Court Abused Its Discretion In Failing To Redline Certain Portions Of His PSI	14
A.	Introduction.....	14
B.	Hubbard's Argument That The District Court Should Have Amended His PSI Is Not Preserved For Appeal.....	15
CONCLUSION.....		17
CERTIFICATE OF SERVICE		17

STATEMENT OF THE CASE

Nature of the Case

Richard Andrew Hubbard appeals from the judgment entered upon his guilty plea to failure to register as a sex offender.

Statement of Facts and Course of Proceedings

After being convicted in California of lewd and lascivious conduct upon a child under fourteen, Hubbard became subject to sex offender registration requirements. (PSI, pp.5-7); see I.C. § 18-8307. In April 2011, Hubbard absconded from his California parole and traveled to Idaho. (PSI, p.9.) In June 2011, California authorities informed Idaho authorities about Hubbard's active felony warrant and possible presence in Idaho. (PSI, p.2.) Idaho police officers located and arrested Hubbard. (Id.) A record check revealed that Hubbard had not complied with the sex offender registration requirement in Idaho. (Id.)

The state charged Hubbard with failure to register as a sex offender. (R., pp.18-19.) Hubbard pled guilty. (R., pp.26-33; Tr., p.11, L.3 – p.17, L.13.) The district court imposed a unified 10-year sentence with five years fixed, to run consecutive to any other sentence Hubbard was currently serving. (R., pp.38-41.) The court later denied Hubbard's I.C.R. 35 motion for reduction of sentence. (R., pp.45-49.) Hubbard timely appealed from the judgment of conviction. (R., pp.50-52.)

ISSUES

Hubbard states the issues on appeal as:

1. Whether the district court violated Mr. Hubbard's right to be free from double jeopardy when it imposed a sentence in this case premised on the belief that California had been too lenient in its initial sentencing on the underlying offense.
2. Whether the district court abused its discretion by focusing intently and almost exclusively on Mr. Hubbard's other offenses for which he had already been punished instead of the facts of the charge at issue when it imposed a sentence in the case before it.
3. Whether the district court abused its discretion by failing to redline the unreliable and erroneous statements regarding Mr. Hubbard's criminal history from the PSI.

(Appellant's brief, p.5.)

The state rephrases the issues on appeal as:

1. Did Hubbard fail to preserve his claim that the district court's sentence is illegal?
2. Has Hubbard failed to show the district court abused its sentencing discretion?
3. Has Hubbard failed to preserve his claim that the district court abused its discretion in failing to redline certain portions of his PSI?

ARGUMENT

I.

Hubbard Failed To Preserve His Claim That The District Court's Sentence Is Illegal

A. Introduction

Hubbard contends the district court violated his double jeopardy rights by imposing a sentence in his failure to register case that essentially punished him for his prior lewd conduct charge for which he had already been sentenced. (Appellant's brief, pp.6-13.) Hubbard's claim fails because he failed to preserve his argument that the district court imposed an illegal sentence. Further, Hubbard has failed to establish fundamental error.

B. Hubbard Failed To Preserve His Illegal Sentence Claim

The double jeopardy clauses of both the United States and Idaho Constitutions protect against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. State v. Corbus, 151 Idaho 368, 370, 256 P.3d 776, 778 (2011). Idaho Criminal Rule 35 allows the trial court to correct an illegal sentence at any time, on the motion of either party, and either party may appeal from the trial court's ruling. I.C.R. 35; State v. Hernandez, 122 Idaho 227, 229, 832 P.2d 1162, 1164 (Ct. App. 1992). A double jeopardy claim asserting that a court imposed multiple punishments for the same offense clearly presents a challenge to the legality of a particular sentence which may be addressed pursuant to I.C.R. 35. State v. Alsanea, 138 Idaho 733, 745, 69 P.3d 153, 165 (Ct. App. 2003) ("An illegal sentence . . . is one in excess of a

statutory provision or otherwise contrary to applicable law.”); State v. Pratt, 125 Idaho 546, 553-560, 873 P.2d 800, 807-815 (1993) (double jeopardy claim analyzed pursuant to Pratt’s I.C.R. 35 motion to correct an illegal sentence presented to the district court); State v. Jensen, 138 Idaho 941, 944 n.2, 71 P.3d 1088, 1091 n.2 (Ct. App. 2003) (a double jeopardy challenge may be raised “by a motion under I.C.R. 35 to correct an illegal sentence.”). Further, a claim of an illegal sentence may not be raised for the first time on appeal without the trial court having first had an opportunity to consider the legality of the terms of the sentence. State v. Lavy, 121 Idaho 842, 845, 828 P.2d 871, 874 (1992) (court declined to consider claim of illegal sentence because defendant presented it for first time on appeal, notwithstanding the fact that the record clearly demonstrated that sentence was illegal); State v. Martin, 119 Idaho 577, 578-79, 808 P.2d 1322, 1323-24 (1991); State v. Dorsey, 126 Idaho 659, 662, 889 P.2d 93, 96 (Ct. App. 1995); Hernandez, 122 Idaho at 229, 832 P.2d at 1164.

While Hubbard filed an I.C.R. 35 motion in this case, he did so only on the grounds of leniency. (R., pp.37, 45-49.) Because Hubbard did not raise the legality of his sentence by a way of an I.C.R. 35 motion below, thereby depriving the district court of the opportunity to correct any alleged error, Hubbard failed to preserve the issue for appellate review, and this Court must decline to address it absent a showing of fundamental error. State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010) (re-articulating Idaho fundamental error review standard.)

In this case however, no fundamental error review is necessary because the policies implicated by the fundamental error doctrine are simply not present.

Most trial errors must be objected to before the district court and raised on direct appeal or a criminal defendant forfeits his opportunity to challenge the alleged error. The doctrine of fundamental error affords a defendant the right to appellate review that would otherwise not exist. However, I.C.R. 35 specifically provides an avenue for pursuing relief from an allegedly illegal sentence at any time, so if this Court declined to consider the issue, Hubbard would not be precluded from having his double jeopardy claim considered by the district court. Consistent with these policies, Idaho appellate courts have declined to perform fundamental error analysis where a defendant raises an illegal sentence claim for the first time on appeal. Lavy, 121 Idaho at 845, 828 P.2d at 874; Martin, 119 Idaho at 578-79, 808 P.2d at 1323-24; Dorsey, 126 Idaho at 662, 889 P.2d at 96; Hernandez, 122 Idaho at 229; 832 P.2d at 1164. The district court must be given an opportunity to correct its errors, after which Hubbard may appeal if he is not satisfied with the district court's decision.

Hubbard appears to acknowledge that pre-Perry, he would have been required to raise his illegal sentence claim to the district court before raising it on appeal. (Appellant's brief, pp.6-7, n.1.) Hubbard recognizes that in State v. Lee, Docket No. 30542, 2005 Unpublished Opinion No. 534, (Idaho App. July 7, 2005), the Idaho Court of Appeals, in an unpublished opinion, considered an issue very similar to that raised in the present case. (Appellant's brief, pp.6-8, n.1.) Citing the availability of relief pursuant to I.C.R. 35, the Court declined to review Lee's unpreserved multiple punishment double jeopardy claim. Lee, 2005 Unpublished Opinion No. 534, pp.2-4. However, Hubbard correctly notes

2005 Unpublished Opinion No. 534, pp.2-4. However, Hubbard correctly notes that Lee does not constitute controlling precedent, and asserts that because Lee pre-dated Perry, the issue needs to be reconsidered utilizing the Idaho Supreme Court's new articulation of the fundamental error review standard. (Appellant's brief, pp.6-8, fn.1.)

Perry, however, merely articulated a new standard with which to analyze fundamental error claims, it did not re-define the concept of fundamental error itself. In Perry, the Idaho Supreme Court sought to remedy confusion caused by "[m]ultiple statements of law pertaining to the fundamental error doctrine." Perry, 150 Idaho at 219-200, 245 P.3d at 971-972. Perry did not grant defendants a new right to choose to bring their illegal sentence claims, which were not raised below and could still be raised pursuant to an I.C.R. 35 motion, for the first time on appeal.

Because Hubbard failed to raise his double jeopardy claim below, and could still raise it as an illegal sentence claim pursuant to I.C.R. 35, this Court must decline to consider this issue for the first time on appeal.

C. Even If This Court Analyzes Hubbard's Claim For Fundamental Error, Hubbard Has Failed To Establish Such Error

Where a defendant does not object to the alleged error below, he has the burden of demonstrating fundamental error in order to obtain relief. Perry, 150 Idaho at 219-226, 245 P.3d at 971-978. Should this Court analyze Hubbard's illegal sentence claim under the standard articulated in Perry, Hubbard must demonstrate that the error he alleges "(1) violates one or more of [his] unwaived

constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) demonstrate that the error affected [his] substantial rights, meaning (in most instances) that it must have affected the outcome of the trial.” Id. at 226-228, 245 P.3d at 978-980. Hubbard cannot meet his burden of showing either that his unwaived constitutional rights were violated, or that any such error plainly exists from the information contained in the appellate record. Therefore, Hubbard has failed to meet the first and second prongs of the Perry fundamental error test.

First, Hubbard has failed to show that his unwaived constitutional rights were violated, or that his claim even implicates double jeopardy. Hubbard does not assert that the district court expressly imposed an additional punishment for his prior California conviction for which he had already been sentenced. Instead, Hubbard contends that the district court violated his double jeopardy rights by “essentially” punishing him for his prior crime by considering California’s lenient prior sentence in its own sentencing analysis, and by focusing too heavily on Hubbard's underlying sex offense in sentencing him in the new failure to register case. (Appellant's brief, pp.6-13.) While a district court may abuse its discretion by focusing too heavily on a prior conviction in imposing a sentence on a new crime, State v. Findeisen, 133 Idaho 228, 229, 984 P.2d 716, 717 (Ct. App. 1999), Hubbard has cited no case standing for the proposition that a sentencing court can violate a defendant’s constitutional double jeopardy rights in this manner. Hubbard has therefore failed to show that

his claim implicates double jeopardy protections.

Second, even if Hubbard could show that a sentencing court can violate a defendant's double jeopardy rights either by considering a prior court's lenient sentence or by focusing too heavily on conduct for which the defendant had already been sentenced, he cannot demonstrate any such error plainly existed in this case. At the sentencing hearing, it was Hubbard's counsel who brought up the issue of Hubbard's California lewd conduct conviction, and that conviction's relationship to the district court's sentencing decision on the new failure to register charge. Hubbard's counsel asserted that Hubbard would be extradited back to California, where he faced potential parole revocation and the likelihood of several years incarceration on the underlying sex offense. (Tr., p.25, L.23 – p.26, L.24.) It would be "unfair" to the Idaho taxpayers, Hubbard's counsel continued, for Hubbard to be imprisoned in Idaho in light of these pending criminal consequences in California. (Id.) Hubbard's counsel asked the district court to "let California handle this." (Tr., p.26, Ls.19-24.) Essentially, Hubbard's counsel was asking the court to impose a more lenient sentence as a result of his California lewd conduct conviction, and his pending criminal consequences in that case.

The district court rejected Hubbard's argument. In so doing, the court appropriately considered Hubbard's failure to register as a sex offender, his prior criminal history, and his ongoing danger to the community:

And there are consequences. In our society one of the only ways we feel comfortable having people like yourself out in the community is if they register so that everybody is on notice that they need to keep their children and their young girls away from

you.

In this case I want to remind you that – you have a fairly significant criminal history. You have DUIs, infliction of corporal injury on your spouse or co-habitant including multiple times, battery. And in this case you – in 2002 you were charged with four counts of L&L. Four. You pled to two. They gave you five years probation. This is the reason that I don't really listen to [Hubbard's counsel's] argument.

I recognize what I'm going to do is going to cost the taxpayers here, but I suspect that the taxpayer would just as soon as pay the cost to make sure that you're locked up and not trust California to do what it's supposed to do. You have four L&L's, you pled to two, and they put you on five years probation. You were only on probation a short period of time when they had to revoke it. They then put you in prison. Then they put you back out.

(Tr., p.30, L.5 – p.31, L.4.)

Later, in response to Hubbard's comment to the presentence investigator that Hubbard was "shocked" that the state was recommending a ten year unified sentence (PSI, p.14), the district court reiterated, "[t]he failure to register [as a sex offender] is significant. As I told you, it's so that we make sure that people like you, other people are aware of." (Tr., p.32, Ls.7-19.)

The district court did not punish Hubbard for his prior crimes for which he had already been sentenced, it rejected Hubbard's counsel's argument that the district court should impose a lesser sentence because of potential (though not necessarily inevitable)¹, future criminal consequences in California. The district court was appropriately concerned with Hubbard's criminal history and the protection of the community. It did not expressly or otherwise indicate an intent

¹ The presentence investigator noted that Hubbard's assumption that he would be extradited to California to face prison time was not verified by any California authority at the time of the PSI report. (PSI, p.15.)

Hubbard may not rely on his own interpretations of the motives behind the court's sentencing analysis to demonstrate plain constitutional error. Hubbard has therefore failed to meet his burden to show plain error from the information available in the appellate record.

Because Hubbard has failed to meet the first and second prongs of the Perry fundamental error analysis, he has failed to establish fundamental error. This Court must therefore affirm the district court's sentence.

II. Hubbard Has Failed To Show The District Court Abused Its Sentencing Discretion

A. Introduction

Hubbard contends that the district court abused its discretion by “focusing intently and almost exclusively” on Hubbard's lewd conduct conviction for which he had already been sentenced. (Appellant's brief, pp.14-15.) However, a review of the context of the district court's sentencing in this case reveals that while the sentencing court considered Hubbard's prior conduct, it did so properly in the context of considering Hubbard's ongoing danger to the community.

B. Standard Of Review

When a sentence is within statutory limits, the appellate court will review only for an abuse of discretion. State v. Farwell, 144 Idaho 732, 736, 170 P.3d 397, 401 (2007); State v. Toohill, 103, Idaho 565, 650 P.2d 707 (Ct. App. 1982).

C. The District Court Acted Within Its Sentencing Discretion

It is well established that a sentencing court may properly consider a wide range of information in determining an appropriate sentence for a defendant. State v. Findeisen, 133 Idaho 228, 229, 984 P.2d 716, 717 (Ct. App. 1999) (citations omitted). Thus, it is entirely appropriate for the sentencing court to consider a spectrum of evidence bearing upon the defendant's character, including the defendant's history of criminal offenses other than the one for which he appears at sentencing. Id. However, a sentencing court may not go "beyond this authority and essentially impos[e] sentence for offenses other than the one that was before the court." Id.

In Findeisen, Findeisen was caught in the process of shoplifting from a Fred Meyer store and was charged and ultimately convicted of burglary. Id. at 228-229, 984 P.2d at 716-717. Several weeks after the incident, Findeisen went to the residence of the loss prevention officer who testified against him at the burglary preliminary hearing and attacked him with pepper spray. Id. at 229, 984 P.2d at 717. Several weeks after that, Findeisen returned to the loss prevention officer's residence and, while brandishing a shotgun and two handguns, forced the loss prevention officer to the floor, handcuffed him, duct-taped his mouth, and shot him fourteen times with a pellet gun. Id. Findeisen was convicted of kidnapping, intimidating a witness, and aggravated battery. Id. Findeisen was sentenced first on these three charges. Id.

When Findeisen was later sentenced for the burglary charge in front of a different judge, the district court noted that the burglary, standing alone, was "a

relatively minor” and “fairly low-level” offense. Id. at 229-230, 984 P.2d at 717-718. The district court described the attack on the loss prevention officer, however, as “a grievous wrong,” and “one of the more appalling offenses that I have seen in over 15 years of being a judge.” Id. The court imposed the maximum ten year sentence for burglary, which it ran consecutive to the charges in the other case. Id.

In vacating Findeisen’s burglary sentence, The Idaho Court of Appeals held that the “intensity of the trial court’s focus on the other offenses,” for which Findeisen had already been sentenced, constituted an abuse of discretion. Id. The Court also noted that the prosecutor focused almost exclusively on the other offenses in his sentencing argument. Id.

While Hubbard attempts to compare his sentence with the vacated sentence in Findeisen (Appellant’s brief, pp.12-15), the cases are easily distinguishable. Rather than downplay the significance of the case in front of it, the district court in the present case twice referenced the importance of the sexual offender registration requirement and its impact on the protection of society. (Tr., p.30, Ls.5-10; p.32, Ls.14-19.) While the district court did reference the leniency of California’s sentence for the underlying lewd and lascivious conduct conviction, it did so, as discussed above, in response to Hubbard’s argument that it should impose a lesser sentence in light of potential future consequences in California for absconding on his parole there. (Tr., p.25, L.23 – p.27, L.6; p.30, L.5 – p.31, L.4.) Further, while the prosecutor referenced Hubbard’s criminal history, including his lewd and lascivious conduct conviction,

he also discussed Hubbard's ongoing risk to the community, lack of amenability to community supervision, and failure to register as a sex offender in Idaho. (Tr., p.22, L.1 – p.25, L.2.)

While a conviction for failure to register as a sex offender is unavoidably intertwined with its underlying sex offense² in terms of a district court's sentencing analysis and application of the appropriate sentencing factors, the district court in this case simply did not discuss or analyze Hubbard's California lewd and lascivious conviction with the same intensity and exclusivity with which the district court in Findeisen discussed the cases associated with the attacks on the loss prevention officer. Instead, the district court's consideration of Hubbard's past conduct was necessary for it to determine, in light of Hubbard's failure to keep authorities properly notified of his whereabouts, the risk Hubbard posed to society and his potential for rehabilitation. It therefore did not abuse its sentencing discretion.

Other factors in the district court's sentencing analysis further support the sentence imposed. The district court was appropriately concerned with Hubbard's prior criminal history. (Tr., p.30, Ls.11-19.) Hubbard was required to register as a sex offender because of his conviction for conducting a lewd and lascivious act upon his 12-year old stepdaughter. (PSI, pp.4-7, 57-76.) Several other lewd and lascivious charges were dismissed. (PSI, pp.3-7.) Hubbard

² In fact, this relationship between a conviction for failure to register as a sex offender and a prior conviction for the underlying sex offense is addressed in I.C. § 18-8311, the failure to register penalty statute. Idaho Code § 18-8311(1) requires a sentencing court to revoke a defendant's current probation or parole, and to run the sentence for failure to register consecutively to the offender's underlying sex offense sentence.

violated his probation by using methamphetamine and marijuana, and was eventually terminated from a sex offender treatment program. (PSI, pp.4-7, 17-23.) Hubbard returned to prison for a time, but eventually was released again on parole. (PSI, pp.4-7.) Hubbard absconded from this parole when he traveled to Idaho. (PSI, pp.2-7.) Additionally, Hubbard has been the subject of three domestic violence investigations, with have resulted in two domestic violence charges and one conviction. (PSI, pp.3-6, 24-56.) While in prison, Hubbard was disciplined for “mutual combat [and] possession [sic] of inmate manufactured alcohol.” (PSI, p.5.)

The district court properly considered Hubbard’s prior record and the appropriate sentencing factors in sentencing him. Hubbard has thus failed to show that the district court abused its discretion in imposing a 10-year unified sentence with five years fixed upon his guilty plea to failure to register as a sex offender.

III.

Hubbard Has Failed To Preserve His Claim That The District Court Abused Its Discretion In Failing To Redline Certain Portions Of His PSI

A. Introduction

Hubbard contends that the district court abused its discretion in failing to redline certain portions of his PSI. (Appellant’s brief, pp.15-17.) Hubbard has failed to preserve this issue for appeal.

B. Hubbard's Argument That The District Court Should Have Amended His PSI Is Not Preserved For Appeal

As discussed above, “[i]t is a fundamental tenant of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal.” State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). Absent a timely objection, the appellate courts of this state will only review an alleged error under the fundamental error doctrine. Perry, 150 Idaho at 227, 245 P.3d at 979.

The prior record section of Hubbard’s presentence investigation report depicts entries for lewd and lascivious conduct in both 2002 and 2005. (PSI, pp.3-4.) The section entitled “Investigator’s Comments and Analysis of Defendant’s Condition” states that “[i]n 2002 and 2005, Mr. Hubbard was convicted of Lewd Conduct with children.” (PSI, p.14.) However, in the prior record comments section, the PSI clarifies that Hubbard was convicted of lewd conduct in 2002, and that his probation was revoked and his sentence imposed on the same charge in 2005. (PSI, pp.5-7.) Thus, the 2005 entry in the prior record section did not depict a new conviction for lewd and lascivious conduct.

In order to further clarify and correct this ambiguity, Hubbard submitted information regarding Hubbard’s criminal history to the court, along with other requested PSI corrections. (PSI, pp.228-229; Tr., p.20, Ls.6-21.) The district court issued a “Sealed Order Correcting Information in Presentence Report,” with Hubbard’s corrections, and added it to the PSI. (PSI, pp.228-229.) At the sentencing hearing, in response to Hubbard’s reference to his requested PSI corrections, the court stated, “Right. And I signed that and made that part of it.”

(Tr., p.20, Ls.20-21.) Several weeks later, the presentence investigator submitted an addendum to the PSI which stated, "Appended is an Order Correcting Information in PSI. Corrections were made in PSI module. This is file information." (PSI, pp.230-233.)

On appeal, Hubbard contends that the district court abused its discretion by merely attaching the corrections to the PSI, and not also "redlining" the clarifications and corrections in the body of the PSI itself. (Appellant's brief, pp.15-17.) Hubbard, however, has failed to preserve any claim that the district court's manner of amending the PSI constituted an abuse of discretion. At the sentencing hearing, the court informed Hubbard that it signed his list of corrections and added them to the PSI. (Tr., p.20, Ls.14-22.) Hubbard thanked the court and made no further objection to the contents of the PSI. (Tr., p.20, L.14 – p.21, L.15.) Further, Hubbard cannot show fundamental error pursuant to Perry because he has alleged no violation of his constitutional rights, nor has he identified any constitutional right to have his PSI corrected in any particular manner, much less a manner he did not request.

Because Hubbard failed to preserve this claim, and because he cannot show fundamental error, this Court must decline to entertain this issue on appeal.

CONCLUSION

The state respectfully requests that this Court affirm Hubbard's sentence for failure to register as a sex offender.

DATED this 28th day of August 2012



MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 28th day of August 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

BRIAN R. DICKSON
STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



MARK W. OLSON
Deputy Attorney General

MWO/pm